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No. 85-1354

In the Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT DIBERNARDO AND THEODORE ROTHSTEIN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that the court of appeals erred in vacating an order dismissing an indictment because the prosecutor did not instruct the grand jury to disregard irrelevant evidence and the grand jury may have heard false testimony.

On October 15, 1980, petitioners were charged in a seven count superseding indictment, returned in the United States District Court for the Southern District of Florida, with conspiracy to use an express company or common carrier to transport obscene materials in interstate commerce, in violation of 18 U.S.C. 371 and 1462; knowingly using an express company or common carrier to transport obscene materials, in violation of 18 U.S.C. 1462; and knowingly transporting obscene materials in interstate commerce, in violation of 18 U.S.C. 1465. After a jury trial, petitioners

were convicted as charged and sentenced. The district court subsequently vacated petitioners' convictions and dismissed the indictment (Pet. App. A50-A51), because it concluded that the grand jury proceedings were tainted by the possibly false testimony of an FBI agent and the failure of the prosecutor to instruct the grand jury to disregard irrelevant evidence. The government appealed; the court of appeals reversed and remanded the case for further proceedings (Pet. App. A1-A15). The court of appeals held that the possibility that the agent testified falsely provided the district court with no ground for the exercise of its supervisory power (Pet. App. A7-A10). It also ruled that the prosecutor had no duty to give a limiting instruction to the grand jury to disregard irrelevant testimony (Pet. App. A11-A14).

Petitioners contend (Pet. 13-19) that the indictment should be dismissed because it was based upon irrelevant evidence and upon the testimony of a person found to be totally unworthy of belief. Petitioners also contend (Pet. 19-22) that relief is warranted because the prosecutor intentionally deceived the district court about the evidence presented to the grand jury. Whatever the merits of petitioners' contentions, they are not presently ripe for review by this Court.[1] The court of appeals' decision places petitioners in precisely the same position they would have occupied if the district court had denied their motions to dismiss. The district court has not ruled on petitioners' alternative motions for a new trial, but it has stated that they would be entitled to such relief if its order dismissing the indictment

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[1]It is now 65 months since the return of the superseding indictment and over 32 months since the district court's dismissal order. Further interlocutory review at this time would cause additional delay in the final resolution of the charges.

were reversed on appeal (Pet. App. A51).[2] If the district court grants the motions for a new trial, petitioners' claims will be mooted if they are acquitted following a second trial. If, on the other hand, petitioners are convicted following a second trial and their convictions are affirmed on appeal, they will then be able to present their contentions to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of the final judgment against them. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

APRIL 1986

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[2]If the district court nevertheless denies the motions on further consideration, and its judgment is upheld on appeal, petitioners may then present all their contentions to this Court in a petition at that time.

[3]Because this case is not ripe for review, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.